(1)

Supreme Court, U.S.
FILED

No. 932043 MAY 18 1994

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Frank McDonough, Jr. -

PETITIONER

vs.

Donna E. Shalala, Secretary of the United States Department of Health and Human Services -

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Frank McDonough, Jr. PRO SE
113 West Drinker Street
Dunmore, Pennsylvania 18512
(717) 342-2567

24 pp

QUESTION PRESENTED

Is petitioner entitled to disability benefits from February 2, 1958, date of disability set by A.L.J., or alternatively, is petitioner entitled to benefits from January 1979, date of first application for benefits, (present date of entitlement is May 1989), and, do the new and material medical reports, submitted by petitioner, in Federal Court, show "good cause" for failure to proceed with the appeal process, (Social Security), in 1979, and also, do these medical reports show "good cause" why same was not introduced on March 5, 1992, at the second A.L.J. hearing?

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF CASE 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 9

INDEX TO APPENDICES

Opinion of A.L.J. (O'Donnell), Social Security Hearings and Appeals 10

Opinion of A.L.J. (Leary), Social Security Hearings and Appeals 11

Opinion of Appeals Council, Arlington, VA. Refer to 53GC9, 210-26-1883 12

Recommendation of Magistrate, adopted by the District Court, Middle District, PA 14

Order of District Court, Middle District, PA 15

Judgment Order, Court of Appeals, Third Circuit 18

TABLE OF AUTHORITIES CITED

STATUTES

United States Code Annotated, Copyright 1991, West Publishing Co., Good Cause, 405, (g), p. 385 6

OTHERS

Social Security Ruling, Good Cause 91-50 (p. 41 transcript) 5

Federal Register, Good Cause, No, 8, January 12, 1994, (p. 1630) 5

Social Security Act, Disability, 216 (i) and 223 respectively 5

Social Security Transcript, Schizophrenia, Paranoia, p. 180 5

Social Security Transcript, Nervous Condition, p. 182 5

DOCTORS REPORTS AND STATEMENTS

Drs. Newton, Symes, Garcia, and Anghel, Schizophrenia, Paranoia, Good Cause. McDonough vs. Shalala, District Court, 3:CV-93-191 7

Drs. Symes and Anghel, Schizophrenia, Paranoia, Good Cause. McDonough vs. Shalala, Appeals Court, Third Circuit, Docket No. 93-7689 8

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

Frank McDonough, Jr. -

Petitioner

vs.

Donna E. Shalala, Secretary of
the United States Department of
Health and Human Services -

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNTIED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Frank McDonough, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the

United States Court of Appeals for the Third Circuit refusing to allow disability payments from date of disability set by Social Security, A.L.J. or alternatively, from date of first application for benefits, January 1979, when petitioner voluntarily withdrew, application prior to reconsideration decision, and also, refusal to accept new material medical reports that show "good cause," for failure to meet appeal deadline, (60 days), in 1979 application and also same medical reports show "good cause" why these medical reports were not introduced at A.L.J. hearing on March 5, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals, 3rd Circuit, February 18, 1994, appears in the Index To Appendices on p. 18, of this Petition. The opinions of the District Court, September 29, 1993, appears on p. 15, of this Petition. The recommended ruling of the Magistrate, August 31, 1993, adopted by the District Court for the Middle District of Pennsylvania, appears in Index to Appendices on p. 14.

JURISDICTION

The Court of Appeals opinion in this matter was filed on

February 18, 1994. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254 (1). (This case was appealed from U.S. District Court, Middle District of Pennsylvania, from the Appeals Council of Social Security Administration.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A., copyright 1991, West Publishing Co., 405, (g), p. 385, is set forth in this petition, on p. 6.

STATEMENT OF CASE

This case is in the welfare of the general public, as a whole, and especially, to service connected U.S. D.A.V.'s, 100% disabled, with a diagnosis of schizophrenic, paranoid with other psychotic disorders.

The petitioner filed an application for disability benefits to the Social Security Administration on January 29, 1979. Petitioner withdrew same, before reconsideration decision by Social Security. Petitioner filed his second application some eleven years later, May 25, 1990, in which petitioner successfully secured benefits after A.L.J. decision on January 25, 1991. Petitioner was awarded benefits from May 1989 (Social Security goes back one year).

Petitioner seeks benefits from date of disability, set by A.L.J., Paul E. O'Donnell, as February 2, 1958 or alternatively from date of first filing, January 25, 1979. "Good Cause" is offered for the failure to appeal within 60 days in 1979, because of a severe schizophrenic, paranoid condition, with other psychotic disorders, and this same condition is offered as "good cause" for failure to produce these six (6) medical reports at the second hearing by the A.L.J., (Leary), while I was receiving Social Security benefits (as well as 100% disability for the V.A.). Dr. Symes second medical report offered in this case deals with "good cause" in relation to presentation of medical reports at the A.L.J. hearing, March 5, 1992. Jurisdiction for the District Court was from an appeal from the Social Security Appeals Council.

REASONS FOR GRANTING THE WRIT

The writ should be granted because, I contend I show "good cause," for a remand. Council of Record, Mr. Rollins, maintains the decision of the Secretary is supported by substantial evidence. I contend the six (6) reports and statements of my doctor's out weight it! The medical reports were not in existence at the time of

the Secretary's decision, and were introduced later, only because the condition of the petitioner, schizophrenic paranoid psychosis, was the reason. Petitioner was out of touch with reality and subjected to unfounded and baseless suspicions and fears. I contend this condition, which merits 100% disability from the V.A., shows good cause.

Another reason I should be granted the writ, is because the same Social Security doctor examined me for both the disability benefits hearing and also the second hearing, on the date of entitlement! I say this was prejudicial to me, and a new and different doctor should have been assigned to the second A.L.J. hearing, (Leary).

Social Security Ruling 91-50 states that if good cause is shown, there is no time limit on my 1979 application! I hold the psychosis was the good cause (schizophrenic, paranoid). Federal Register, Good Cause No. 8, January 12, 1994, p. 1630. Social Security Act Disability, 216(i) and 223 respectively. Social Security Transcript, Schizophrenia, Paranoid p. 41, par 2. Social Security Transcript, Nervous Condition, p. 180, middle page, and

also p. 181. Another reason I believe I should be granted the writ is that the A.L.J. (Leary), his findings are speculative and his opinion, not facts. I claim I show good cause for not meeting the deadline for 60 days for appeal in 1979 because of my mental condition, of delusional thinking, false concepts and ideas, and fears of doctor's examinations. I received both V.A. and Social Security Disability benefits at the time of the A.L.J. hearing, (Leary). Because of the condition, obtaining and introducing medical reports and statements at the A.L.J. hearing, (Leary) could be considered "not obtainable".

U.S.C.A. 405 (g), p. 385, reads, "The court (District Court) may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such evidence if so ordered, modify or affirm his findings of fact or his decision, or both and shall file with the court any such additional and modified findings of fact and decision, and

a transcript of the additional record and testimony upon which his action is modifying or affirming was based." U.S.C.A. copyright 1991 - by West Publishing Company. I contend I fulfill good cause with six doctor's reports, from four different doctors, three psychiatrists, and one board certified neurologist. I contend, that this new medical evidence could not have been introduced at the A.L.J. hearing, (Leary), due to a schizophrenic paranoid psychosis, and the weight of it shows good cause for the remand! I hold the writ should be granted because Judge Caldwell, in District Court, erred in his order, on p. 1, when he stated my application for benefits in 1979 was denied by an A.L.J. The application, was withdrawn by petitioner, prior to reconsideration decision, and never got to A.L.J. in 1979.

I feel the writ should be granted because Dr. Newton, (board certified neurologist), suggests change of entitlement date, (to 1979 or 1958), Dr. Symes, (board certified psychiatrist), and Dr. Anghel (V.A.M.C., Wilkes-Barre, Pennsylvania, psychiatrist) both state good cause, and Dr. Garcia, (head psychiatrist, V.A.M.C., Wilkes-Barre, Pennsylvania), reports schizophrenic,

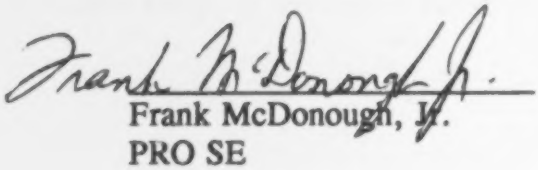
paranoid, psychosis condition existing continually not diminishing from 1958 to present time! I hold these medical reports show good cause for any delay in proceedings or submission of medical evidence at A.L.J. hearing (Leary). Dr. Symes says good cause is possible in his second report and Dr. Anghel says petitioner is paranoid. I hold these two reports show good cause for not introducing medical evidence at the A.L.J. hearing, (Leary). (I went to Philadelphia, Pennsylvania, V.A.M.C., and saw Dr. Mavarek, Mental Hygiene Clinic, for another report, on April 21, 1994, but he could not give one that day, and suggested a future appointment when I could get one, but the time element came in here, because I did not have enough time to wait for the appointment, so I returned to Scranton without a statement.)

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: June 15, 1994

Respectfully submitted,



Frank McDonough, Jr.
PRO SE

SOCIAL SECURITY OFFICE OF HEARINGS AND APPEALS.

Application for disability benefits.

DECISION

It is my decision that, based on the application protectively filed on May 25, 1990, the claimant is entitled to a period of disability commencing February 2, 1958 and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

ORIGINAL SIGNED BY
Paul E. O'Donnell
Administrative Law Judge
Office of Hearing and Appeals
Room 3110, Penn Place
20 N. Pennsylvania Avenue
Wilkes-Barre, PA 18701

Date: January 25, 1991

SOCIAL SECURITY OFFICE OF HEARINGS AND APPEALS.

Question is entitlement date.

DECISION

It is the decision of the undersigned Administrative Law Judge that the claimant, Frank McDonough, Jr., based on his application protectively filed on May 25, 1990 is entitled to a period of disability commencing on February 2, 1958 and to disability insurance benefits commencing with the month of May 1989 pursuant to sections 216(i) and 223, respectively, of Title II of the Social Security Act, as amended.

ORIGINAL SIGNED BY
Joseph F. Leary
Administrative Law Judge
Office of Hearings & Appeals
Room 3110, Penn Place
20 N. Pennsylvania Avenue
Wilkes-Barre, PA 18701-3587

Date: April 24, 1992

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Action of appeals council on request for review

Refer to 53GC9-210-26-1883

The Appeals Council has carefully considered your contention in a statement dated April 30, 1992, that you are entitled to disability payments beginning February 1958 based on an Administrative Law Judge decision dated January 25, 1991. In the alternative, you contend you are entitled to benefit payments beginning January 1978 based on prior application filed January 25, 1979. The hearing decision issued on April 24, 1992, indicated (pages 2 through 5) the Administrative Law Judge considered all of the facts and issues in the case, including Social Security Ruling 91-5p, and properly concluded good cause for extending the deadline for requesting a hearing on the 1979 application was not established. Further, a review of the taped hearing testimony reveals a medical expert who reviewed the evidence of record, including consideration of your testimony at the hearing, concluded that during the period at issue you had the mental capacity to understand the procedures for requesting review.

The medical records you submitted from the Veterans Administration for the period from March 1989 through August 1992 are not relevant to period at issue before the Administrative Law Judge. The appeals Council concludes neither the additional evidence nor your contentions provide a basis for changing the Administrative Law Judge's decision.

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. In researching this conclusion the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case.

Sincerely,

ORIGINAL SIGNED BY
W. Stephen Hubbard
Administrative Appeals Judge

Dated: January 27, 1993

Since it appears that the plaintiff had the capacity in 1979 to understand the notice he received and to act accordingly despite his mental impairment, the 1990 application would control. That being the case, the Secretary correctly found that under 42 U.S.C. §423(b), plaintiff was entitled to no more than one year of retroactive benefits based on his effective filing date.

On the basis of the foregoing, **IT IS RESPECTFULLY RECOMMENDED THAT:** plaintiff's motion for summary judgment be denied and defendant's motion for summary judgment be granted.

ORIGINAL SIGNED BY
RAYMOND J. DURKIN
United States Magistrate Judge

Dated: August 31, 1993

Order United States District Judge Middle District, Pa.

McDonough vs. Shalala 3:CV-93-191 September 29, 1993

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Pending is the Report and Recommendation of the United States Magistrate Judge and Plaintiff's objections.

Plaintiff sought judicial review of an adverse decision by the Secretary of Health and Human Services. Plaintiff suffers from certain mental and emotional problems and sought retroactive disability benefits for the years after 1958 as well as ongoing benefits for the future. The Secretary allowed him retroactive benefits for one year and indefinite prospective benefits.

Plaintiff argues that he should receive benefits at least from the late 1970's, as he filed his first application for benefits in 1979. In 1979, an administrative law judge denied the application and Plaintiff withdrew the application without appeal. (Honorable Judge Caldwell's error. Plaintiff withdrew application prior to reconsideration decision in 1979. Transcript p. 91). Plaintiff now contends that his schizophrenia and paranoia prevented him from understanding the appeal process. In the current action, the

administrative law judge determined that a number of factors suggested that Plaintiff had the ability to understand the appellate process and, thus, no waiver was in order.

The United States Magistrate Judge determined that the administrative law judge's findings were supported by substantial evidence. Further, the Magistrate Judge declined to remand the case to the secretary to consider several physician's reports introduced by Plaintiff after the administrative process and during the judicial review process. The Magistrate Judge correctly noted that remand is available only where the new evidence was not available to the litigant at the time of the initial fact-finding hearing. 42 U.S.C. § 402(g). There is no evidence that Plaintiff could not have adduced this recent evidence when he appeared before the administrative law judge.

We have reviewed the record, the Report and Recommendation of the U.S. Magistrate Judge, and Plaintiff's objections and we find that the Report and Recommendation is fully supported by the record.

AND NOW, this 29th day of September, 1993, upon

consideration of the Report of the United States Magistrate Judge, dated September 1, 1993, and Plaintiff's objections, and upon independent review of the record, it is ordered that the Magistrate Judge's Report be adopted. It is further ordered, pursuant to the Magistrate Judge's recommendation, that:

1. Plaintiff's motion for summary judgment is denied.

2. Defendant's motion for summary judgment is granted.

3. The Clerk of Court shall close the file.

ORIGINAL SIGNED BY
William W. Caldwell
United Stated District Judge

UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUIT

No. 93-7689

FRANK L. MCDONOUGH, JR.,

Appellant

V.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

On appeal from the United States District Court for the Middle

District of Pennsylvania (D.C. Civil No. 93-cv-00191) District Judge: Hon. William W. Caldwell

---

Submitted Pursuant to Third Circuit LAR 34.1(a)

February 9, 1994

Before: SLOVITER, Chief Judge

COWEN and LEWIS, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered September 30, 1993 be and is hereby affirmed. Costs taxed against appellant.

By the Court,

D.K. Solviter
Chief Judge

Attest:

P. Douglas Sisk, Clerk

Dated: February 18, 1994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NO._____

Frank McDonough, Jr.,

PETITIONER

v.

Donna E. Shalala, Secretary of
the United States Department of
Health and Human Services,

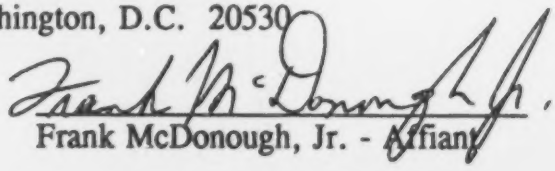
RESPONDENT

PROOF OF SERVICE

I, Frank McDonough, Jr., do swear or declare that on this date, June 15, 1994, I have served the attached PETITION FOR A WRIT OF CERTIORARI on the Solicitor General, by depositing an envelope containing the above documents in the United States mail properly addressed and with first-class postage prepaid.

The name and address of those served are as follows:

The Solicitor General
Department of Justice
Washington, D.C. 20530



Frank McDonough, Jr. - Affiant